No. 92-1352

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

HAROLD A. PETERSON; MARY J. PETERSON,
Petitioners,

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT SOO LINE RAILROAD COMPANY'S BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

The Restated Question For Review Is:

Whether ERISA preempted Petitioners' state law tort claims which arose from their attempts to obtain medical benefits for their dependent child from a self funded employee benefit plan governed by ERISA when Petitioners were not plan participants or beneficiaries.

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PARENT AND/OR SUBSIDIARY COMPANIES

Pursuant to Sup. Ct. Rule 29.1, Soo Line identifies its parent and/or subsidiary companies as follows:

Parent Companies

(1) Soo Line Corporation

(2) Canadian Pacific (U.S.) Holding, Inc.

(3) Canadian Pacific Management Inc.

(4) Canadian Pacific Limited

Subsidiaries (except wholly-owned subsidiaries) include:

(1) Chicago, Terre Haute and Southeastern Railway Company

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OPINIONS BELOW

The Ninth Circuit Court of Appeals stated that disposition of the case was not appropriate for publication and it has not been published.

JURISDICTION

1. The Judgment in the Ninth Circuit Court of Appeals was entered on 15 October, 1992.

2. The Supreme Court has jurisdiction to consider a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

II.

STATEMENT OF THE CASE

Soo Line Railroad Company (hereafter Soo Line) supplements Petitioners' (Petersons) Statement of the Case as follows:

Petersons original Complaint against Soo Line and DCA Healthcare Management, Inc. (hereafter DCA) asserted that Soo Line and DCA were "contractually obligated to pay for the health care of Heather Salo at Excelsior in Colorado . . . ." They claimed that "there was an express health care contract which provided for benefits for Mary Heather Salo." Petersons further alleged that "[t]he contract for the health care of Mary Heather Salo [was] established by past consideration related to the employment of Joseph V. Salo by The Milwaukee Railroad."

Because Joseph Salo was employed by The Milwaukee Railroad at the time of his disability, he and his dependents were eligible for certain benefits. Those benefits included health care coverage under a "self-funded" medical plan sponsored by The Milwaukee Railroad. As a management employee, Mr. Salo and his dependents were covered by The Milwaukee Railroad AND SUBSIDIARY COMPANY'S MEDICAL CARE PLAN (for executives, officers, and exempt employees). The Milwaukee Railroad plan was "self-funded", i.e., it was not an insurance policy because all benefits were paid directly by the employer.

The TERMINATION OF COVERAGE provision of The Milwaukee Railroad Medical Plan, § 14.0, provided inter alia: "All coverage for you and your dependents will cease upon termination of employ-

ment. In addition, medical care coverages under the plan will be discontinued on the day before a covered person becomes eligible for Medicare." Joseph Salo became eligible for Medicare in approximately March of 1980.

The Milwaukee Railroad filed for bankruptcy protection in 1977. SLRCO, a subsidiary of Soo Line Corporation, acquired certain assets of The Milwaukee Railroad and assumed certain obligations for some of its railroad employees. Some former employees of The Milwaukee Railroad became eligible for benefits under the Soo Line medical benefit plan following the February 19, 1985 acquisition of certain assets by SLRCO (this entity later changed its name to The Milwaukee Road, Inc.). The Milwaukee Road, Inc. was merged with Soo Line Railroad Company on December 31, 1985.

Joseph Salo was incorrectly identified as a person who was eligible for benefits under the Soo Line Medical Benefit Plan following the Milwaukee/Soo Line acquisition. Because of this error, medical claims submitted by dependents of Joseph Salo to Soo Line were incorrectly paid. By June 26, 1986, it was determined that the dependents of Joseph Salo were incorrectly receiving health care benefits from Soo Line.

On April 22, 1986, Heather Salo, a dependent of Joseph Salo and Mary (Salo) Peterson was admitted to Deaconess Medical Center in Billings, Montana for treatment of emotional/mental problems. Heather remained in Deaconess Hospital until July 20, 1986. Heather Salo was then admitted to Excelsior Youth Care Center in Colorado on July 21, 1986. Petersons signed two (2) written con-

tracts: 1) AGREEMENT FOR PRIVATE PLACEMENT, and 2) ENROLLMENT AGREEMENT. Neither Soo Line or DCA, the plan supervisor for the Soo Line self-funded employee medical benefit plan, were signatories to these contracts.

On approximately June 27, 1986, the benefits administrator for Soo Line reviewed the claims being made for Heather Salo's mental health care. Based on this review and subsequent investigation, it was determined that coverage should have terminated prior to this date. Termination notice was then communicated to a claims examiner for DCA.

Mary Peterson was notified that dependent coverage under Mr. Salo's medical plan was terminated when she received a form from DCA after submitting a claim for one of her other children. She contacted DCA who in turn referred

her to the benefits administrator for Soo Line. She was told that coverage should have been cancelled when Joseph Salo became eligible for Medicare but apparently, the Medicare issue had been overlooked and dependent benefits were continued. Although Soo Line determined that benefits were terminated after June 27, 1986, it paid for Heather Salo's entire hospitalization at the Billings Deaconess facility through July 20, 1986. It made no attempt to seek reimbursement for health care benefits that were improperly paid to the dependents for over six (6) years.

In response to the denial of benefits, Mary Peterson retained an attorney in August of 1987 "with respect to the medical group coverage for her family, which was issued under her previous husband, Joseph V. Salo." Petersons' attor-

ney claimed that there was a letter from The Milwaukee Railroad assuring Mary Peterson that there would be "complete coverage" for the dependents of Joseph Salo. He demanded that "Soo Line immediately pay all outstanding bills from Excelsior, and continue medical coverage as promised until the youngest Salo child [was] eighteen (18)."

In response to the demand, Soo Line advised Petersons' attorney of the information necessary for a "formal review", as provided by ERISA under Mr. Salo's health care plan. Petersons failed to provide the requested information to Soo Line. They continued to demand that the dependents were entitled to coverage under the health care program of The Milwaukee Railroad as it existed at the time Joseph Salo became disabled.

Soo Line officially denied Petersons' claim for health care benefits because it was contrary to the specific terms and conditions of the ERISA governed medical plan. Petersons were advised, "as provided under ERISA", that the medical plan had a formal review procedure if they disagreed with the decision. A copy of the ERISA mandated procedure was provided to the Petersons. Rather than following the formal review process, Petersons filed a lawsuit seeking relief, not under ERISA, but under state law theories of liability.

III.

SUMMARY OF ARGUMENT

Petersons' Petition should be rejected because no issue of significant and important federal law has been raised. The application of preemption

to state law tort claims, like the Petersons', referencing, relating to and dependent upon the existence of an ERISA governed employee benefit plan, has been settled by this Court. The Constitutional issues first identified by the Petersons in this Petition come too late for consideration by this Court.

Regardless of how Petersons characterize their claims today, the factual record relied upon by the Ninth Circuit Court of Appeals shows that their state law based claims had no independent existence, apart from the ERISA governed health care plan at issue in this case. Because Petersons' claims could not survive without reference to and reliance upon the ERISA plan, preemption was properly applied by the Ninth Circuit court.

Petersons' status as non-participants or non-beneficiaries under the

plan is irrelevant to the proper application of preemption. Petersons' seek to be reimbursed for the costs and expenses associated with the mental health care provided to Mary Peterson's minor daughter, Heather. They are, in effect, acting in a representative capacity for Heather, asserting a right to plan benefits. The resolution of entitlement to plan benefits ultimately turns on the interpretation, application, and administration of the ERISA governed plan, not on the status of the Petersons as plan participants or beneficiaries.

More importantly, they seek tort, extra contractual, and punitive damages. These are not recognized forms of relief under the remedial provisions of ERISA. They are asking to be treated more favorably as nonparticipants or non-beneficiaries of the ERISA plan than

a participant or beneficiary, when the basis of the claims would be the same, i.e., the ERISA governed health care plan.

Petersons have not been denied a remedy. Their real complaint is that they did not like the remedy that was available to them. They voluntarily chose to forego the ERISA mandated review process in the hopes that they could escape the preemptive force of ERISA. They took a calculated risk when they pursued state law theories of liability rather than following ERISA procedures. They should not now be heard to complain because they are barred by preemption, the very risk they knew they faced when they sought alternative relief, outside the statutory framework of ERISA.

Petersons' Petition is another attempt by them to avoid ERISA preemption. It raises the same arguments that have been considered and rejected by the federal district court and the Ninth Circuit. They are entitled to no greater relief than a plan participant or beneficiary who relies upon and references an ERISA governed plan in making a claim, just as the Petersons are doing here. Under the facts of this case, in combination with the controlling law, preemption was properly applied.

IV.

ARGUMENT

A. NO IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW IS PRESENTED BY PETERSONS PETITION FOR WRIT OF CERTIORARI

Petersons' Petition should be denied because the Ninth Circuit Court of

Appeals correctly applied the established body of interpretive law relating to the preemptive force of ERISA to the state law based common law claims at issue here. This Petition presents no special or important reasons sufficient to move this Court's discretion to review the issues presented by Petersons. The appellate court's decision does not present an unsettled question of law requiring resolution by this Court, nor does it present a decision on a federal question that conflicts with the applicable decisions of this Court.

The preemptive ambit of ERISA is a "settled" question of federal law. The issue raised by the Petersons' is not an undecided "important" federal question. To the contrary, ERISA preemption has been reviewed and reaffirmed on numerous occasions by this Court. Thus, the dis-

cretionary power of this Court should not be exercised to grant Petersons' Petition. Sup. Ct. R. 10.1(c).

1. Petersons Failed To Timely Raise Constitutional Claims

The Petition should also be denied because it raises issues not considered below. Petersons now want to assert Constitutionally based claims of due process and equal protection. However, in all of the proceedings below, there was no mention or reference to a Constitutional claim. The failure to raise these issues in the district court or the appellate court was a failure to preserve the issues for review and a waiver of their applicability to the issues before this Court. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.13 (1976); Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 (1976).

B. PETERSONS' STATE LAW BASED TORT CLAIMS ARE DEPENDENT UPON THE ERISA GOVERNED HEALTH CARE PLAN AND ARE THEREFORE PREEMPTED

This Court has consistently applied a "liberally expansive", broad common sense interpretation to the statutory phrase "relate to" found in ERISA. See Pilot Life Insurance Co. v. Deadeaux, 481 U.S. 41, 46-47 (1987); Shaw v. Delta Airlines, 473 U.S. 85, 97-98 (1983); Ingersoll-Rand Co. v. McClendon, 498 U.S. ___, 112 L. Ed. 2d 474, 483 (1990). Accordingly, this Court has ruled that a state law relates to a benefit plan "if it has a connection with or reference to such a plan." Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985), quoting Shaw, 463 U.S. at 97. The Ninth Circuit Court of Appeals in deciding the case below was guided by the teachings of this Court. "In deter-

mining whether a claim is preempted, it is necessary to decide whether 'the conduct challenged' . . . was part of the administration of an emplovee benefit plan." Peterson v. Soo Line Railroad, No. 91-35659 (9th Cir. Oct. 15, 1992) at 3, citing Scott v. Gulf Oil Corp., 754 F.2d 1499, 1505 (9th Cir. 1985). The court identified the appellate issue as "whether the Petersons' state law claims 'relate to' Soo Line Railroad Company's ('Soo Line') employee health care plan." Id. In reaching its decision, the appellate court concluded that the conduct challenged by the Petersons was, in fact, part of the administration of an ERISA governed plan. Id. at 4.

Petersons have mischaracterized Soo Line's position regarding the existence of a health care plan after 1980. Soo line has not argued "[t]here was no

plan", as represented by the Petersons. Petition at 4,9. To the contrary, it has been Soo Line's position that when Mr. Salo became eligible for Medicare benefits, based on the specific terms and conditions of the applicable health care plan, coverage for his dependents should have terminated. However, because of an administrative oversight which probably occurred during the complicated process of Soo Line acquiring certain assets and obligations of the bankrupt Milwaukee Railroad, his dependents continued to receive health care coverage until June of 1986. In other words, the dependent children received a significant monetary benefit at the expense of Soo Line's administrative error. But Soo Line has never sought a refund or reimbursement for the improperly paid health care benefits.

The issue before this Court, though, is whether the Petersons have an unlimited right to continue to benefit because of that mistake? Not only do the Petersons want all of the medical benefits allegedly due under the health care plan, they demand the right to go outside the plan to seek tort and punitive damages. Because these issues cannot be resolved without reference to and reliance upon the ERISA governed employee benefit plan, preemption must necessarily apply.

2. The Factual Record Documents Petersons Reference To And Reliance Upon The ERISA Governed Plan

The Ninth Circuit court carefully analyzed the factual record. It cited to substantial evidence showing that whatever information was provided to the Petersons by DCA or Soo Line, regardless of its substantive character, that infor-

mation related to coverage under an ERISA governed health care plan. Id. at 4. Consequently, "any causes of action which arise from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA governed plan and [were] therefore, preempted by ERISA." Id.

The appellate court critically analyzed the "gravamen of the Petersons' state law claims." It noted the relationship between the state law claims and the health care benefit plan. Id. Petersons' reliance on the alleged statements of DCA was the basis for their state law claims. Therefore, "[e]ven if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable." Id. Citing this Court's deci-

sion in Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S. Ct. 478 (1990), the appellate court stated "the existence of a . . . plan is a critical factor in establishing liability under the state [claims] and the state claims are thus preempted." Id. at 5.

3. Petersons' Purposely Rejected Their ERISA Remedies

The Ninth Circuit court also considered but likewise rejected Petersons' claims that they "cannot be left without a remedy." Petition at 9. They were not "without a remedy", they were simply unsatisfied with the remedy they may have been entitled to pursue. Petersons' seek to avoid the preemptive force of ERISA by trying to characterize their claims as something other than claims for benefits under an ERISA governed plan. But as the Ninth Circuit court

ruled: "We understand this argument, but we reject it." Peterson, at 3.

The factual background of this case is replete with references to the ERISA governed plan by the Petersons; with reliance on the terms and conditions of the ERISA governed plan by the Petersons; with a clear understanding by the Petersons of the relationship between the ERISA governed plan and the benefits claimed. The Ninth Circuit court properly pointed out that "if benefits were due to Heather, she had a cause of action under ERISA." Peterson at 5. This case should be about a claim for medical benefits for the Petersons' dependent child Heather, utilizing the remedial provisions of ERISA. Instead, Petersons are attempting to preserve some kind of independent state law based tort

claim, including the imposition of punitive damages, for themselves.

Moreover, Petersons' were advised of their potential remedies and the procedure they must follow to avail themselves of those remedies. It must be assumed that they took a calculated, conscious, and deliberate risk to forego the ERISA mandated process with the expectation that they would have the right to pursue relief outside the preemptive ambit of ERISA. They gambled and they lost. This is not a case where there was no remedy, this is a case where the remedy was not pursued.

The appellate court in the decision below observed that the status of the Petersons, whether they were plan participants or beneficiaries, was not the determinative issue in deciding if their state law based claims could survive

ERISA preemption. Rather, and even more fundamentally, the Ninth Circuit court looked to this Court for guidance: "There is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme" Id. at 5 citing Olson v. General Dynamics Corp., 591 F.2d 1123 (9th Cir. 1991). Ultimately, as the appellate court correctly observed, "[p]reemption of a party's common law remedy is not dependent on the existence of an ERISA remedy." Peterson at 5.

Thus, there is no basis in law or in fact for the Petersons to ask this Court to overrule its settled, long-standing precedent of applying ERISA preemption to state law based common law tort claims which relate to, reference, and rely on the administration of an

ERISA governed employee benefit plan, like the plan involved in this case.

V.

CONCLUSION

Petersons have failed to present sufficient justification for this Court to accept their Petition. The law relating to ERISA preemption of state law based tort claims, like the Petersons, is settled. Their Petition should be denied.

Respectfully submitted,

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March 9, 1993

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD A. PETERSON; MARY J. PETERSON,	)	No. 91-35659
Plaintiffs-Appellants,	)	D.C. No. CV-89-00112-RW
vs.	)	
SOO LINE RAILROAD COMPANY; DCA HEALTH CARE MANAGEMENT GROUP INC.,	)	
Defendants-Appellees.	)	

Appeal from the
United States District Court
for the District of Montana
Richard W. Anderson,
Magistrate Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

Before: BROWNING, THOMPSON and KLEINFELD,
Circuit Judges

OVERVIEW

In this diversity action, Harold A. Peterson and Mary J. Peterson ("the Petersons") appeal the district court's summary judgment holding that their state law claims were preempted by the Employee Retirement Income Security act, 29 U.S.C. § 1001 et seq. (1985) ("ERISA"). The Petersons further contend that they were improperly denied an opportunity to amend their complaint to add additional state law claims. We have jurisdiction under 28 U.S.C. § 1291 (1966), and we affirm.

DISCUSSION

Summary judgment is "appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law." Green v. Los Angeles County

Superintendent of Schools, 883 F.2d 1472, 1475 (9th Cir. 1989). Within the context of this case, if ERISA preempts the Petersons' state law claims, then the defendants are entitled to summary judgment.

"'[T]he question whether a certain state action is preempted by federal law is one of congressional intent.'" Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). ERISA's preemption provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Pilot Life, 481 U.S. at 46 (citation omitted). Moreover, it has recently been described by the Supreme Court as "conspicuous for its breadth." FMC Corp. v. Holliday, 498 U.S. ___, ___,

111 S. Ct. 403, 407 (1990). It provides for federal preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) . . . ." 29 U.S.C. § 1144(a) (1985) (emphasis added). The question on which this appeal turns, then, is whether the Petersons' state law claims "relate to" Soo Line Railroad Company's ("Soo Line") employee health care plan.

The Petersons argue that they are claiming damages which they suffered because they relied on statements made by representatives of DCA Health Care Management Group ("DCA"), rather than benefits due under Soo Line's employee benefit plan. As a consequence, they contend their claim does not relate to Soo Line's plan and is not preempted by ERISA. We understand this argument, but

we reject it.

State law claims which "arise from the administration of [an ERISA governed] plan[] . . ." are preempted. Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985); see also Greany v. Western Farm Bureau Life Ins. Co., 1992 U.S. App. LEXIS 20462 (9th Cir.). In determining whether a claim is preempted, it si necessary to decide whether "the conduct challenged . . . was part of the administration of an employee benefit plan." Scott, 754 F.2d at 1505.

In Greany, the plaintiff had left he defendant's employ on July 31, 1983, believing his family was covered by the defendant's group health plan until August 31, 1983. In fact, the coverage terminated August 1, 1983. There was, however, at least one notice from the

insurer to the plaintiffs stating that coverage terminated August 31, 1983. Unfortunately, the plaintiff's wife gave birth prematurely in the interim, to a baby that needed extensive medical care. When the insurer refused coverage, the plaintiff brought suit asserting several common law causes of action.

In analyzing the case, we noted that despite attempts by the plaintiff to recharacterize the relationship between the parties, "[i]n reality, the Greanys challenge[d] the administration of ERISA plan benefits , . . ." Greany v. Western Farm Bureau Life Ins. Co., 1992 U.S. App. LEXIS 20462. We said this was so because the employer's conduct "was merely a continuation of the duties it has as an employer in providing the group plan." Id. As a

result, the state claims were preempted by ERISA.

Similarly, in this case, the conduct challenged was part of the administration of an ERISA plan. DCA's representative's statements, which the Petersons claim to have relied on, were made, if at all, while administering Soo Line's employee benefit plan. Soo Line had hired DCA to administer its plan, and that is how the Petersons came into contact with DCA. Mary Peterson did not call DCA at random to request assistance with Heather's medical bills. She called it to ask about coverage because she thought that Heather was a beneficiary under Soo Line's plan. DCA's answers to Mary Petersons's inquiries, regardless of their substance, were thus provided in furtherance of its duty to administer

the plan. As a result, as in Greany, any causes of action which arose from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA-governed plan and are therefore preempted by ERISA.

Moreover, where the existence of an ERISA-governed plan is a "critical factor" in establishing a state law claim, ERISA preempts it. Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, ___, 111 S. Ct. 478, 483 (1990). In Ingersoll, the plaintiffs had filed a state law wrongful discharge claim alleging that their employer fired them to avoid paying benefits which would otherwise have become due. The Court held that, as the benefit plan's existence was a critical factor in their claim, the claim related to the plan and ERISA preempted it.

In the present case, the relation between the state law claims and the benefit plan is even closer. Here, the gravamen of the Petersons' state law claims is that they relied on DCA's statements and suffered damages as a result. Event if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable. See Trad Industries, Ltd. v. Brogan, 246 Mont. 439, 446 (1991) (dicta); Keil v. Glacier Park, Inc., 188 Mont. 455, 462 (1980) (dicta); see also Restatement of Contracts § 90 (1932). If the Petersons did not believe Heather was covered by the plan, no reliance on DCA's promises to pay for her health care could possibly have been reasonable. Consequently, as in Ingersoll, "the

existence of a . . . plan is a critical factor in establishing liability under the State (claims)" and the state claims are thus preempted.

Despite the relationship discussed between the Petersons' state law claims and the Soo Line benefit plan, the Petersons argue that neither of them is either a participant in or a beneficiary of the Soo Line plan as defined by 29 U.S.C. § 1002 (7), (8) (1985). The contend that as a result, if they are denied their state law claims they will be left with no remedy. Thus, they argue, their state law claims cannot be preempted.

In the first instance, it may be that if benefits were due to Heather, she had a cause of action under ERISA. The Petersons' argument, however, must be rejected for an even more fundamental

reason. As this court has previously held, "[t]here is simply no reason to assume that Congress has previously held, "[t]here is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme." Olson v. General Dynamics Corp., 951 F.2d 1123 (9th Cir. 1991); see also Porcaro v. The Colonial Life Insurance Co. of America, 1991 U.S. Dist. LEXIS 15800 (W.D. Va.). Preemption of a party's common law remedy is not dependent on the existence of an ERISA remedy.

Finally, the Petersons contend they should have been allowed to amend their complaint and that the district court improperly denied their motion to do so. We disagree. Based on the foregoing analysis, any additional state law claims for benefits which were

denied under the plan, or for damages because the benefits were denied, would be preempted by ERISA. As a result, the Petersons' proposed amendment would be futile. Futility being a proper ground for refusing to allow an amendment, Hurry Up Retirement Fund Trust, 648 F.2d 1252 (9th Cir. 1981), the district court's denial of the motion to amend was proper.

AFFIRMED: